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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS IVAN PARRA,

Defendant and Appellant.

B190000

(Los Angeles County
Super. Ct. No. BA280385)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Charlaine F. Olmedo, Judge. Affirmed.

William Flenniken, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Kenneth J. Kao, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Carlos Ivan Parra challenges his attempted voluntary manslaughter and assault with a firearm convictions on the ground the trial court violated his right to a jury trial by imposing the upper term. We conclude the trial court permissibly relied upon recidivism factors to impose an upper term.

BACKGROUND AND PROCEDURAL HISTORY

Appellant walked up to a car in which Benny Castro was sitting outside his workplace and fired four to six shots at Castro, striking him in the hand, stomach and chest. Appellant then demanded money from another man seated in the car. The man handed over his money, and appellant shot at, but missed that man.

A jury convicted appellant of attempted voluntary manslaughter, as a lesser included offense of attempted murder, and assault with a firearm. The jury also found, with respect to each count, that appellant personally used a gun and inflicted great bodily injury on Castro. The court sentenced appellant to 12 years in prison.

DISCUSSION

In sentencing appellant, the trial court selected the high term of five years for attempted voluntary manslaughter. It explained its choice as follows: “That is based upon your record that it is increasing in seriousness and in repetition of crimes and that prior attempts with regard to probation and parole have failed. So on that basis, the court is selecting the high term.”

Citing *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), appellant contends the imposition of the upper term violated his right to a jury trial, in that it was based upon facts found by the court, not a jury.

Apprendi essentially requires any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be charged, must be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490.) *Blakely* clarified that the relevant “‘statutory maximum’ for *Apprendi* purposes

is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely, supra*, 542 U.S. at p. 303, original italics.)

After appellant’s brief was filed in this case, the United States Supreme Court decided *Cunningham v. California* (2007) --- U.S. --- [127 S.Ct. 856], which held that California’s Determinate Sentencing Law violates *Apprendi* to the extent it permits a trial court to impose an upper term based on facts found by the court rather than by a jury beyond a reasonable doubt.

In *Apprendi*, the court explained that recidivism was distinguishable from other matters used to increase a sentence because (1) recidivism traditionally has been used by sentencing courts to increase the length of a sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial procedural protections. (*Apprendi, supra*, 530 U.S. at p. 488.) The recidivism exception to *Apprendi* has been deemed by many courts to extend beyond the mere fact of a prior conviction to include closely related matters, such as the nature of the prior conviction. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223; *People v. McGee* (2006) 38 Cal.4th 682, 702-707; *People v. Waymire* (2007) --- Cal.App.4th ---, -- - [2007 WL 1168518].)

The trial court’s choice of the high term in this case was based entirely upon recidivism-related factors. The probation report indicates appellant was convicted in November 1996 of taking or driving a vehicle without the owner’s consent and in December 1996 of burglary. For each of these convictions, he received probation, which was revoked in April 1997. At that time, he was sentenced to 16 months in prison. He was deported in February 1999, and in September 2002 he was convicted of illegal reentry and deported again. In July 2003, he was convicted of taking or driving a vehicle without the owner’s consent, and again was granted probation. In October 2004, he was found to have violated his probation. The charged offenses occurred on January 11, 2005. Thus, appellant had a lengthy record of prior convictions, and the trial court

permissibly made the closely-related determinations from his record that he had performed poorly on probation and parole, that he had repeatedly committed the crimes of taking or driving a vehicle without the owner's consent and illegal entry into the United States, and that his convictions, including this case, were of increasing seriousness. The court's reliance on these recidivism-related facts did not violate appellant's right to a jury trial.

DISPOSITION

The judgment is affirmed.

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BOLAND, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.